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IN THE

Supreme Court of the United States

JOHN DOE, On Behalf of Himself and All Others Similarly Situated,
Petitioners,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can the Government Deny a Person a Statutory Entitlement Based on Failure to Satisfy a Regulatory Requirement that the Government Itself Deliberately Refused to Fulfill?

2. When a Person is Prevented from Fulfilling a Regulatory Requirement Due to Deliberate Misrepresentations Specifically Approved by an Agency's Highest Officials and Other Governmental Misconduct, is the Agency Equitably Estopped from Relying on the Regulation to Withhold a Statutory Entitlement?

3. In the Alternative, Should this Court Summarily Reverse the Decision of the Federal Circuit Because, After Overruling Binding and Controlling Precedent, It Failed to Give Petitioners an Opportunity to Introduce New Claims and Evidence to Meet the New Legal Standard?

LIST OF PARTIES

Appellants in the Court of Appeals, Petitioners here, are representatives of a certified opt-in class of more than 9000 current and former attorneys employed by the United States Department of Justice. The party identified in the caption as John Doe is Daniel S. Jacobs. He is one of 186 class representatives, thirty of whom proceeded under pseudonyms. *See Doe v. United States*, 44 F. App'x 499 (Fed. Cir. 2002).

Appellee in the Court of Appeals, Respondent here, is the United States.

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JOHN DOE, On Behalf of Himself and
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UNITED STATES,
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit entered September 11, 2006.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 463 F.3d 1314 (Fed. Cir. 2006) (*Doe IV*), and is reproduced at A. 1a.[1] The opinion of the Court of Federal Claims is reported at 63 Fed. Cl. 798 (2005) (*Doe III*), and is reproduced at A. 25a.

[1] Citations to "A." are to the appendix hereto. Citations to "J.A.I" are to the Joint Appendix filed in the Court of Appeals during the interlocutory appeal (case no. 03-5075; *Doe II*), while citations to "J.A.II" are to the Joint Appendix filed in the Court of Appeals during the appeal from the final judgment of the Court of Federal Claims (case no. 05-5104; *Doe IV*).

The opinion from an earlier, interlocutory appeal in this case is reported at 372 F.3d 1347 (Fed. Cir. 2004) (*Doe II*), and is reproduced at A. 38a. The earlier opinion of the Court of Federal Claims is reported at 54 Fed. Cl. 404 (2002) (*Doe I*), and is reproduced at A. 67a.

JURISDICTION

The judgment of the Court of Appeals was entered on September 11, 2006. *See* A. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) (2000).

STATUTES AND REGULATIONS INVOLVED

5 U.S.C. §§ 5541(2)(c), 5542, and 5546(b); 28 U.S.C. §§ 1295(a), 1346(a)(2), and 1491; 31 U.S.C. §§ 1342 and 1350; and 5 C.F.R. § 550.111 are reproduced in Appendix E.

STATEMENT OF THE CASE

The Federal Employees Pay Act ("FEPA") guarantees all federal employees, including attorneys and other professionals, the right to overtime pay for work in excess of 8 hours per day or 40 hours per week. *See* 5 U.S.C. § 5542(a) (2000); *cf. id.* § 5541(2)(c) (listing exempt classes of employees).[2] Congress specifically enacted FEPA to provide overtime pay for white-collar government workers and put them on "par[] with those in other Federal services." 91 Cong. Rec. H5899 (daily ed. June 11, 1945) (statement of Rep. Ramspeck); *see also* 91 Cong. Rec. H6061 (daily ed. June 13, 1949) (statement of Rep. Angell).

As a matter of policy established and approved by its highest ranking officials, the United States Department of Justice

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[2] Unlike FEPA, the Fair Labor Standards Act exempts professional and administrative employees from its 40-hour workweek and overtime pay requirements. 29 U.S.C. § 213(a)(1) (2000).

("DOJ") required its nearly 12,000 attorneys to perform hundreds of thousands of hours of overtime work between 1992 and 1999. In one calendar year alone, attorneys in a ***single component*** of ***one*** DOJ office worked "the equivalent of 96 person years" in uncompensated overtime. J.A.I 00929. Notwithstanding its attorneys' clear statutory right to receive overtime pay, DOJ, as a matter of departmental policy, has refused to pay for the overtime it requires its attorneys to work.

Although DOJ concedes that § 5542(a) applies to its attorneys, J.A.II 0382, it has simply failed to comply with the law and instead developed a series of policies designed to nullify its attorneys' statutory entitlement to overtime pay. These policies sought to take advantage of an OPM regulation, 5 C.F.R. § 550.111(c) (2006), which states that authorization for overtime work must be documented in writing by authorized officials. DOJ's first strategy was simply to prohibit its officials from issuing specific written approval for overtime work that DOJ nevertheless required its attorneys to perform. Second, DOJ repeatedly issued official communications, approved by its top officers, falsely stating that its attorneys were not eligible to be paid for the hundreds of thousands of extra hours they spent working on nights, weekends, and federal holidays. Finally, DOJ restricted the authority to order or approve overtime to only a handful of top agency officials in Washington, D.C. Even that limited grant of authority proved illusory, however, because many of those authorized to approve overtime were unaware that they even had that power and testified uniformly that they would not have issued such authorization for overtime pay due to DOJ policy.

By insisting that employees have written authorization for each specific occasion of overtime work, while making it impossible to obtain any such writings, DOJ created a Catch-22 that nullified its attorneys' right to overtime pay under

§ 5542(a). DOJ relied on this lack of specific written approval as its basis for refusing to pay Petitioners—a class of thousands of DOJ attorneys and Assistant United States Attorneys—hundreds of millions of dollars in overtime and holiday pay to which they were statutorily entitled under 5 U.S.C. §§ 5542(a) and 5546(b).

DOJ's refusal to pay its attorneys for overtime work they were required to perform was flatly inconsistent with decades of case law interpreting § 5542(a). For half a century, the Court of Claims had held that an agency which requires its employees to work overtime, yet refuses to document each such demand in writing, could not rely on the absence of such written authorization under 5 C.F.R. § 550.111(c) as a basis for denying its employees the overtime pay they had earned. *See, e.g.*, *Anderson v. United States*, 136 Ct. Cl. 365 (1956) (per curiam). The trial court in this case, relying on that clear precedent, granted summary judgment on liability to Petitioners. *See Doe v. United States*, 54 Fed. Cl. 404 (2002) ("*Doe I*"). On interlocutory appeal, however, a panel of the Federal Circuit jettisoned that long-standing line of cases and held that DOJ could require its attorneys to perform overtime work, but avoid paying for it, simply by refusing as a matter of policy to issue specific written approvals. *See Doe v. United States*, 372 F.3d 1347 (Fed. Cir. 2002) ("*Doe II*"), *cert. denied*, 544 U.S. 904 (2005).

Compounding the injustice, in a later ruling, the Federal Circuit affirmed the Court of Federal Claims's refusal to allow Petitioners the opportunity to amend their Complaint to pursue alternate theories of relief, despite *Doe II*'s seismic shift in the legal landscape. *See Doe v. United States*, 463 F.3d 1314 (Fed. Cir. 2006) ("*Doe IV*"). The Federal Circuit also rejected Petitioners' renewed arguments for relief under § 5542(a). Petitioners had claimed that § 550.111(c) was invalid as applied to this case, and that DOJ should be equitably estopped from enforcing it here, due to DOJ's blanket policy

that any requests for overtime pay for attorneys be denied; its officially sanctioned, deliberate misrepresentations to its attorneys concerning their right to overtime pay; and its refusal to authorize enough officials even to review requests for such pay. The Federal Circuit rejected these arguments, creating a circuit split by flatly holding that this Court's precedents prevented Petitioners from attempting to equitably estop the Government from enforcing a generally valid regulation, even if Petitioners could establish that the Government engaged in affirmative misconduct. *Doe IV*, 463 F.3d at 1321–22.

This case is about far more than the 9000 DOJ attorneys who are owed over half a billion dollars in overtime pay. It is about the proper application and interpretation of the federal statute governing overtime compensation for ***all*** 2.7 million federal civilian employees, and whether the Government can manipulate its overtime approval process to compel those employees to work overtime without being paid. It is about whether the Government can coerce volunteer work in violation of the strict criminal prohibitions of the Antideficiency Act, 31 U.S.C. § 1342 (2000). Most importantly, it is about whether the highest ranking officials of DOJ—the agency charged with punishing violations of the Nation's laws—can deliberately make it impossible for its employees to fulfill a regulatory requirement, or intentionally lie to its employees to prevent or deter them from satisfying that requirement, and then rely on the DOJ officials' own misconduct as a basis for denying those employees their statutory rights.

The Federal Circuit's blessing of the Executive Branch's decision to ignore a federal statute cannot be reconciled with our system of separation of powers. This Court should grant certiorari.

I. THE GOVERNMENT'S AFFIRMATIVE MISCONDUCT

A. The Department of Justice and Its Top Officials Had Long Been Aware That DOJ Attorneys Were Entitled to Overtime Pay.

FEPA requires the Government to pay federal employees for "hours of work officially ordered or approved in excess of 40 hours in an administrative workweek, or . . . in excess of 8 hours in a day." 5 U.S.C. § 5542(a). The Government has conceded that its attorneys and other professionals "plainly are" covered by FEPA. J.A.II 0382.

Indeed, for over twenty-five years, senior DOJ officials repeatedly have been cautioned that DOJ attorneys were entitled to overtime pay under § 5542(a), but were not being paid in accordance with the law. In 1980, for example, the Office of Legal Counsel ("OLC") recognized that attorneys "are entitled to overtime" under FEPA and that the Department's policy of refusing to compensate attorneys for overtime work was "inconsistent with the statutory mandate, and . . . not likely to protect the United States in litigation." A. 118a. A subsequent review in 1984 by the Deputy Director of the Office of Attorney Personnel Management concluded that this policy was "unwise at best, and unlawful at worst." J.A.II 0067. This memorandum recommended that DOJ clarify that its attorneys "are entitled to premium pay or compensatory time on the same basis as other DOJ employees." *Id.* at 0071; *see also* J.A.I 00432 ("[A]ttorneys employed by the Civil Division [are] entitled to overtime pay. . . .").

After another internal reexamination a decade later, Assistant Attorney General Walter Dellinger issued a policy for OLC stating, "When employees in the Department are required to work beyond their usual hours, they are entitled to overtime pay or compensatory time." A. 133a. DOJ never

extended that policy to attorneys outside of OLC. Attorney General Reno declined to bring the rest of the Department into compliance with FEPA, despite being warned by a DOJ Working Group studying this issue about "potential embarrassment to the Department as the chief enforcer of Federal law, including overtime statutes." A. 129a.

Several years later, Deputy Associate Attorney General Francis M. Allegra wrote in an internal memorandum, "[I]t is problematic (some might use the term unconscionable) for the Department to continue to not pay its attorneys overtime knowing full well that the overtime statute applies." A. 135a. DOJ ignored these warnings and continued to deny its attorneys overtime pay.

B. DOJ Required Its Attorneys to Work Overtime.

The Court of Federal Claims found that the Department of Justice officially required its attorneys regularly to work overtime:

> Attorneys are expected to work overtime and they do so on a regular basis. They are induced to work overtime by direct supervisors . . . . The overtime that they work is well known at the highest levels of the Justice Department. The Department recognizes that it could not function properly within its budget constraints without officially induced and approved overtime work by government attorneys.

Doe v. United States, 54 Fed. Cl. 404, 405 (2002) ("*Doe I*").

The record below amply supports these findings. The U.S. Attorney's Manual—described by the head of the Executive Office for U.S. Attorneys as "the gospel . . . that governs all the U.S. Attorney's Offices," J.A.I 00163–64—stated that "Assistant U.S. Attorneys are professionals and should expect to work in excess of regular hours without overtime premium pay." A. 119a. A memorandum to the Attorney General

confirmed, "Attorneys are frequently expected to, and do, work more than 8 hours per day and/or 40 hours per week without extra compensation." A. 124a (emphasis in original). The Assistant Attorney General for Administration "testified that he did expect that attorneys would work overtime, and that he approved of that policy. He stated that any employee who thought that he or she was working overtime with DOJ approval would have been reasonable in making such an assumption." *Doe I*, 54 Fed. Cl. at 407.

That message was repeated in individual DOJ office manuals and policies throughout the nation. *See, e.g.*, J.A.II 0140 (Orientation Handbook for the District of Wyoming); J.A.II 0147 (Manual for the District of Montana). These overtime requirements also were reinforced by directives from United States Attorneys, who made clear that the intense demands on federal prosecutors and their heavy workloads required overtime work. *See* J.A.I 01349 ("[M]anagers have told attorneys that a substantial amount of unscheduled overtime duty is inherent to the job."); J.A.I 01336 (same).

The United States Attorney for the District of South Carolina, for example, issued a memorandum stating that "AUSAs who are working less tha[n] 48 hours per week, on an average, are viewed as underemployed by [DOJ]." J.A.I 00883. Similarly, the United States Attorney for the Northern District of Indiana circulated an e-mail stating, "[I]f you are not averaging at least 50 hours per week let me know. We have some cases for assignment." J.A.II 0144. Another United States Attorney stated, "Those of you that feel your docket is of a size that can be handled in a 40-hour work week please see the supervisor in your office for some additional assignments." J.A.I 00898; *see also* J.A.I 00889 (establishing a "goal" of "50 h[ou]rs" each week); J.A.I 00892 (average overtime must be "well over 40 hours a month"); J.A.I 00962 (lawyers cannot work "fewer than 45 hours each week"); J.A.I 00887 ("I expect each attorney to

report a minimum of approximately sixty-five hours of overtime per month.") (emphasis in original).

The Department's insistence that its attorneys work overtime was successful. An internal DOJ Working Group found that attorneys "commonly averag[ed] 5 to 9 extra hours per week." J.A.I 00941. The Group recognized that "failure to put in extra hours can jeopardize an attorney's chance for recognition, promotion, etc." *Id.* at 00933. Attorneys in some offices worked an average of 20 overtime hours each week. *Id.* at 00881. Average workweeks in late 1998 ranged from 45 to 52 hours. J.A.I. 01053–53c.

C. DOJ Refused to Pay Its Attorneys for Their Overtime Work and Falsely Informed Them That They Were Ineligible for Overtime Pay.

DOJ repeatedly told its attorneys that they could not obtain specific written authorization for overtime pay as a matter of DOJ policy. DOJ Order 1551.3(8)(a)(1), for example, stated that "[i]t is the general policy of the Department not to order overtime for attorney personnel." J.A.II. 00027. The U.S. Attorney's Manual explained that attorneys were expected to work overtime "without overtime pay." A. 121a. A memorandum to all United States Attorneys and Administrative Officers from the Executive Office for U.S. Attorneys likewise emphasized that "authorizing overtime . . . is contrary to the Department policy." A. 111a.

Official statements by DOJ's litigating divisions confirmed this policy. The Antitrust Division informed its employees, for example, that attorneys "[a]re required to put in substantial overtime and travel time without additional compensation." J.A.II 00150A. The Criminal Division likewise noted that its attorneys "frequently work long hours, beyond the 'normal' 40 hour workweek," but that time is "not recorded for overtime pay purposes." J.A.I 00924.

U.S. Attorneys' Offices further reiterated this policy and went so far as to tell attorneys, falsely, that they were not eligible to receive overtime pay. For instance, the District of South Carolina circulated a memorandum to its employees stating, "Attorneys are ineligible for paid overtime or compensatory time," but must "work the number of uncompensated hours in addition to the standard 40 hour workweek needed to successfully accomplish their work." J.A.I 00915. Of course, these policy statements did not relieve DOJ of its obligation to pay its attorneys for their overtime work; as the Court of Federal Claims emphasized, "agencies may not exempt themselves from the law by the simple expedient of issuing a policy stating that it will not pay overtime." *Doe I*, 54 Fed. Cl. at 417.

D. DOJ Made It Impossible to Receive Specific Authorization from an Authorized Official for Overtime Work.

To further prevent attorneys from fulfilling § 550.111(c)'s writing requirement, DOJ empowered only a handful of DOJ officials in Washington, D.C. to authorize each specific occasion of overtime work in writing, *see* J.A.II 0026 (DOJ Order 1551.3); J.A.I 00397 (DOJ Order 1200.1), including the Director of the Executive Office for U.S. Attorneys and the Assistant Attorneys General for Administration and the Environmental, Civil, and Civil Rights Divisions. *Doe I*, 54 Fed. Cl. at 414; *see also* J.A.I 00491, 00518–19. Even this limited grant of authority was of no utility because most of these officials were unaware they even had authority to authorize overtime. *Doe I*, 54 Fed. Cl. at 414; *see also* J.A.I 00491, J.A.II 00205–06. The Government expressly admitted that "[t]here were no further re-delegations" of this authority beyond this group of top officials in Washington. J.A.II 00348; *see also* J.A.I 00166.

Petitioners' expert witnesses testified without contradiction that this concentration of authority was "designed to establish a method whereby it was clearly impractical if not impossible to assume that authority for overtime could be obtained in sufficient time. . . . [T]he failure to delegate the authority to lower levels in the field is an intentional device by the Justice Department to avoid the payment of overtime to field attorneys." J.A.II 00225–26; *see also* J.A.II 00219. Thus, DOJ further ensured that its thousands of attorneys throughout the nation would be unable to obtain the specific written approval that DOJ claims is needed to be compensated for the overtime work that was expected and required of them.

E. DOJ Required Its Attorneys to Keep a False Set of Time Records.

DOJ also required its employees to keep two dramatically different sets of time records. "One record shows that all attorneys work eight hours per day, forty hours per week. The other set includes detailed records of the hours that they actually worked." *Doe I*, 54 Fed. Cl. at 415. The cooked set of books was used for pay purposes, *see, e.g.*, J.A.I 00966 (sample timesheet); the true records were "used for budgetary purposes and to assess attorneys' fees against opposing parties when statutes permit." *Doe I*, 54 Fed. Cl. at 407. Thus, the Department filed fee petitions with courts seeking reimbursement for overtime hours it refused to pay its attorneys for working, *see, e.g.*, J.A.I 01008 (motion filed by an AUSA seeking attorneys' fees for "542.75 regular hours and 179.75 overtime hours"), and submitted requests to Congress for additional funds based on the number of uncompensated overtime hours its attorneys worked, *see* J.A.II 0239–40; J.A.I 01356–57.

II. THE RULINGS BELOW.

A. In *Doe II*, the Federal Circuit Overruled Half a Century of Precedent and Denied Petitioners' Overtime Claims Due to Failure to Satisfy § 550.111(c)'s Writing Requirement.

The Court of Federal Claims granted summary judgment for Petitioners, ruling that they were entitled to overtime pay under 5 U.S.C. § 5542(a). *Doe I*, 54 Fed. Cl. at 418. Relying on a massive record establishing that authorized officials wanted and needed attorney personnel to work overtime and required them to do so, the trial court concluded that DOJ "has 'ordered or approved' overtime for members of the Class, for purposes of [§ 5542(a)]," *id.* at 405, entitling them to overtime compensation. This ruling rested on an unbroken line of cases dating back several decades which held that § 5542(a) would be eviscerated if an agency could require employees to work overtime without pay by refusing to issue specific written authorization for that work. *See, e.g.*, *Byrnes v. United States*, 163 Ct. Cl. 167, 174 (1964) ("The invocation of departmental regulations requiring specific written authority for overtime cannot avoid the plain requirements of the statute for overtime pay when the performance of this overtime is induced by the Government . . . .").

Overruling fifty years of precedent, the Federal Circuit reversed the grant of summary judgment to Petitioners and, without allowing Petitioners to meet the new legal standard, directed that summary judgment be granted for the Government. *Doe II*, 372 F.3d at 1354–57. It held that two opinions of this Court having nothing to do with § 5542(a), *Schweiker v. Hansen*, 450 U.S. 785 (1981), and *OPM v. Richmond*, 496 U.S. 414 (1990), *sub silentio* overruled the cases upon which Petitioners and the Court of Federal Claims had relied. *Id.* It explained that these precedents gave insufficient weight to 5 C.F.R. § 550.111(c), an OPM regulation stating that overtime work "may be ordered or approved only in writing by an

officer or employee to whom this authority has been specifically delegated." The Federal Circuit concluded that, because DOJ had refused to issue specific written approval for the overtime work it required Petitioners to perform, they were not entitled to overtime pay. *Doe II*, 372 F.3d at 1363. This Court denied certiorari of that interlocutory ruling. 544 U.S. 904 (2005).

B. In *Doe IV*, the Federal Circuit Held That DOJ's Affirmative Misconduct Does Not Prevent It from Enforcing § 550.111(c)'s Writing Requirement and That, Despite *Doe II*'s Dramatic Change in the Law, Petitioners Could Not Pursue New Claims.

Following the Federal Circuit's ruling in *Doe II*, the Court of Federal Claims immediately rendered summary judgment in DOJ's favor on all Petitioners' claims. J.A.II 00297. Petitioners moved the court to reconsider its entry of final judgment, arguing that, given the Federal Circuit's dramatic shift in the case law, they had the right to raise additional arguments and pursue alternate theories for recovery that were "not needed under the existing state of the law" prior to *Doe II*. J.A.II 00544–45. Petitioners also argued that their § 5542(a) claim was still viable because § 550.111(c)'s writing requirement was invalid as applied to the circumstances of this case and, in any event, the Government was equitably estopped from enforcing it, due to: (i) DOJ's order that its officials not issue specific written approval for overtime work; (ii) DOJ's refusal to appoint enough authorized officials to approve overtime work in advance; and (iii) DOJ's blatant and repeated misrepresentations to its attorneys concerning their eligibility for overtime pay.[3] *Id.*

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[3] In their first round of briefing to the Federal Circuit in *Doe II*, Petitioners repeatedly emphasized that they were not at that time raising equitable estoppel arguments, because they were unnecessary in light of the then-established principle that an employee is entitled to pay for any work

The Court of Federal Claims rejected Petitioners' as-applied challenge and refused to allow Petitioners to present their equitable estoppel arguments or make new claims. *See Doe v. United States*, 63 Fed. Cl. 798, 804 (2005) (*Doe III*). The Federal Circuit affirmed the lower court's decision. *Doe IV*, 463 F.3d at 1327. It held that this Court's rulings in *Schweiker*, 450 U.S. 785, and *Richmond*, 496 U.S. 414, categorically barred Petitioners from attempting to equitably estop the Government from enforcing § 550.111(c)'s writing requirement, regardless of the scope of the Government's alleged misconduct. The Federal Circuit concluded that "***any*** equity-based attack to the reasonableness of the writing requirement must fail." *Id.* at 1321 (emphasis added). It also held that Petitioners were not entitled to raise new claims because, although *Doe II* overruled numerous previously binding cases, it did not actually "set forth a new legal standard." *Id.*

ARGUMENT

I. THE FEDERAL CIRCUIT HAS EFFECTIVELY REPEALED THE STATUTORY RIGHT TO OVERTIME PAY OF ALL FEDERAL EMPLOYEES.

In *Doe IV*, the Federal Circuit upheld DOJ's deliberate, intentional decision effectively to repeal Petitioners' statutory right to overtime pay under 5 U.S.C. § 5542(a) through its unreasonable and illegal application of 5 C.F.R. § 550.111(c). This ruling has government-wide significance because § 5542(a) applies to almost every federal employee in nearly every civilian agency. Absent review by this Court, the Federal Circuit's ruling will be binding throughout the nation, and § 5542(a)'s statutory command will be reduced to a mere suggestion.

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his agency compels or encourages him to perform, regardless of whether he is given specific written authorization. *See* J.A.II 00464–67.

A. Because the Federal Circuit is the Only Court of Appeals with Jurisdiction Over FEPA Claims, Its Ruling Affects Virtually Every Federal Employee.

Although this case involves a significant amount of money—over $500 million in overtime and holiday pay, *see* J.A.II 00250—the issues it raises are of even greater magnitude. This case directly affects not only the 9000 Petitioners whose claims the Federal Circuit rejected, but all 2,713,200 federal civilian employees, almost all of whom are covered by FEPA.[4] It has particular significance for the 1,061,019 professional and administrative federal employees[5] who, like Petitioners, are exempt from the Fair Labor Standards Act, 29 U.S.C. § 213(a)(1), and must rely exclusively on 5 U.S.C. § 5542(a) for their right to overtime pay. The Government itself argued below that the importance of this issue "cannot be exaggerated" because § 5542 "applies to the entire Federal Government." Pet. of the U.S. for Permission to Take an Interlocutory Appeal at 8. This case represents this Court's only real opportunity to correct the Federal Circuit's misinterpretation of FEPA and, more generally, to prevent wholesale Executive Branch nullification of § 5542(a).

There will never be a circuit split concerning the proper interpretation and implementation of § 5542(a) because the Federal Circuit is the only court in the nation with jurisdiction to review appeals in federal overtime pay cases, *see* 28 U.S.C. §§ 1295(a)(2), (a)(3), whether the case originates in the Court of Federal Claims under the Tucker Act, 28 U.S.C. § 1491 (2000), or local district courts under the Little Tucker Act, 28

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[4] *See* Office of Federal Civilian Workforce Statistics, Office of Personnel Management, *The Fact Book* 7 (2005 ed.), *available at* http://www.opm.gov/feddata/factbook/2005/factbook2005.pdf (last visited Dec. 3, 2006).

[5] *Id.* at 45.

U.S.C. § 1346(a)(2) (2000). In recognition of the Federal Circuit's unique role in the federal judicial system and its exclusive jurisdiction over certain substantive areas, this Court repeatedly has granted certiorari in important cases from the Federal Circuit even in the absence of a circuit split. *See, e.g., Teleflex, Inc. v. KSR Int'l Co.*, 119 F. App'x 282 (Fed. Cir. 2005), *cert granted sub nom. KSR Int'l Co. v. Teleflex, Inc.*, 126 S. Ct. 2965 (2006); *U.S. Postal Serv. v. Gregory*, 534 U.S. 1 (2001) (federal personnel law); *United States v. Hatter*, 532 U.S. 557 (2001) (judicial pay claims); *United States v. Winstar Corp.*, 518 U.S. 839 (1996) (money claims against the government). Here, review is necessary to protect the statutory right to overtime pay of over 2.7 million federal civilian employees and to reaffirm that the Executive Branch cannot unilaterally nullify statutory rights by making it impossible to satisfy regulatory requirements.

This case is an ideal vehicle for reviewing the Federal Circuit's rulings because of the breadth and depth of the record. Claims for overtime pay frequently are pursued by individuals or small groups of co-workers for small amounts of money and rarely justify the time and expense of bringing an appeal to the Supreme Court. *See, e.g., Amos v. United States*, 13 Cl. Ct. 442, 452 (1987) (rejecting liquidated damages claims by eleven correctional institution cook foremen for being required to work during lunch breaks). Such relatively small claims, however, have significant value to those employees, whom Congress has protected by enacting § 5542(a). This Court should grant certiorari to ensure that FEPA is interpreted and applied properly throughout the federal government.

B. DOJ'S Refusal to Issue Written Authorizations for Required Overtime Work in Accordance with 5 C.F.R. § 550.111(c) Effectively Repealed Its Attorneys' Statutory Right to Overtime Pay Under 5 U.S.C. § 5542(a), Rendering the Regulation Invalid as Applied.

The Federal Circuit's ruling jeopardizes the overtime rights of all federal employees because, contrary to this Court's precedents, it allows the Executive Branch to use an administrative regulation to circumvent a federal law and effectively repeal a statutory right. Most cases addressing a regulation's validity assess whether the text of the regulation itself contradicts or unreasonably interprets a federal law. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). Separation of powers, however, also bars an agency from nullifying a statutory right or otherwise frustrating the clear congressional intent behind a statute by unreasonably implementing or administering a facially valid and otherwise unremarkable regulation. *See INS v. Nat'l Ctr. For Immigrants' Rights, Inc.*, 502 U.S. 183, 188 (1991) (distinguishing between regulation which "is facially invalid because it is without statutory authority" and regulation which "may be invalid as applied in [certain] cases"); *see, e.g., Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 619 (1991). As this Court explained in *United States v. Haggar Apparel Co.*,

> The analysis of a regulation's application in any particular case, of course, may disclose an imprecise or imperfect implementation of the statute. . . . ***In the process of considering a regulation in relation to specific factual situations***, a court may conclude the regulation is inconsistent with the statutory language or is an unreasonable implementation of it. ***In those instances, the regulation will not control.***

526 U.S. 380, 392 (1999) (emphasis added). Put simply, an agency cannot nullify a federal statute by promulgating a

seemingly innocuous regulatory requirement that in practice undermines the underlying statutory entitlement; in such a case, the regulation is invalid as applied. *See Chevron*, 467 U.S. at 843 (noting that federal agencies "must give effect to the unambiguously expressed intent of Congress").

In this case, 5 U.S.C. § 5542(a) provides that "hours of work officially ordered or approved in excess of 40 hours in an administrative workweek, or . . . in excess of 8 hours in a day . . . performed by an employee are overtime work and shall be paid for." 5 C.F.R. § 550.111(c) elaborates that "[o]vertime work . . . may be ordered or approved only in writing by an officer or employee to whom this authority has been specifically delegated." Unlike other writing requirements that require ***an applicant*** to submit a written request for benefits, *see, e.g.*, 20 C.F.R. § 404.611(a) (2006) (Social Security applications must be in writing on a particular form), § 550.111(c) establishes a written authorization requirement that ***only the agency can satisfy***. DOJ nevertheless ordered its officials, as a matter of policy, to deny attorneys the specific written approval they needed under § 550.111(c) to be compensated for the extra work they were required to perform. *See* J.A.II 0027, DOJ Order 1551.3 (Nov. 15, 1971) ("It is the general policy of the Department not to order overtime for attorney personnel."). It did so, OLC concluded, "as a device to escape the payment of premium pay." A. 115a.

In *Doe II*, the Federal Circuit found that § 550.111(c)'s writing requirement was a reasonable interpretation of § 5542(a) under *Chevron*. 372 F.3d at 1362. This Court declined to review that ruling. 544 U.S. 904 (2005). In *Doe IV*, however, the Federal Circuit went on to conclude that § 550.111(c) also was valid and enforceable as applied to the particular factual circumstances of this case. 463 F.3d at 1320–22. Whether or not § 550.111(c)'s writing requirement is facially valid, allowing DOJ to establish a policy of

refusing to issue specific written authorization for required overtime work, and then using the absence of such written approval as a basis for denying its attorneys overtime pay, squarely contradicts Congress's clear intent as embodied in § 5542(a). *See INS v. Cardoza-Fonesca*, 480 U.S. 421, 447–48 (1987) (noting that courts "must reject administrative constructions which are contrary to clear congressional intent"); *BATF v. FLRA*, 464 U.S. 89, 97 (1983).

Allowing the Federal Circuit's ruling to stand would permit the Executive Branch effectively to repeal statutes at will by promulgating regulatory requirements and then making it impossible to satisfy them. It would be the equivalent of refusing to provide application forms to citizens seeking Social Security and then denying them benefits under 20 C.F.R. § 404.611(a) based on their failure to submit the proper form. *Cf. Schweiker*, 450 U.S. at 790 (noting that a "regulation requiring that applications be in writing" on a particular form is facially valid). An agency cannot abdicate its responsibilities in this way and then invoke its own failure as a justification for denying a person a statutory right.

DOJ's application of § 550.111(c), if left undisturbed, also would mean that the Attorney General, DOJ's top officials, and supervisors throughout the nation have intentionally and systematically violated the Antideficiency Act. This Court should not permit an agency to administer or implement a regulation so as to cause its top officials to violate a federal statute, particularly a criminal law. The Antideficiency Act states, "An officer or employee of the United States Government . . . ***may not accept voluntary services*** for [the] government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property." 31 U.S.C. § 1342 (2000) (emphasis added). The statute provides that "[a]n officer or employee of the United States Government . . . knowingly and willfully violating section . . . 1342 . . . shall

be fined not more than $5,000, imprisoned for not more than 2 years, or both." *Id.* § 1350.

Under the Act, employees are barred from waiving parts of their congressionally mandated minimum salary. *See In re Employment Status of "Volunteers" Connected With Federal Advisory Comms.*, 6 Op. Off. Legal Counsel 160, 162 (1982); *see especially In re: Nat'l Mediation Bd. Obligation of Amounts for Compensation and Expenses*, No. B-217475, 1986 U.S. Comp. Gen. LEXIS 11, at *1 (Dec. 24, 1986). The Government's argument in the lower courts, that Petitioners are not entitled to compensation because they performed the work at issue "voluntarily," *see* J.A.II 0398; *see also* J.A.II 0351, 0375; Def.'s Mot. For Summ. J. at 7, confirms that DOJ's application of § 550.111(c) in the circumstances of this case violated the Antideficiency Act, contravened Congress's clearly expressed intent, and cannot be permitted to stand. Given the Federal Circuit's exclusive jurisdiction over FEPA appeals, this Court is the only body that can correct this error and safeguard the rights of federal employees throughout the nation.

II. THIS COURT SHOULD RESOLVE THE CIRCUIT SPLIT OVER WHETHER THERE ARE ANY CIRCUMSTANCES UNDER WHICH THE GOVERNMENT MAY BE EQUITABLY ESTOPPED FROM DENYING A PERSON A STATUTORY ENTITLEMENT.

This Court has stated, "[W]hen the Government acts in misleading ways, it may not enforce the law if to do so would harm a private party as a result of governmental deception." *Heckler v. Cmty. Health Servs.*, 467 U.S 51, 60 n.12 (1984) (citations omitted). It continually has emphasized that affirmative misconduct may be sufficient to justify the use of equitable estoppel against the Government. *See, e.g., Richmond*, 496 U.S. at 423 ("We leave for another day whether an estoppel claim could ever succeed against the Government.");

INS v. Miranda, 459 U.S. 14, 19 (1982) (per curiam).[6] Most circuits "will not allow the government to deal dishonorably or capriciously with its citizens," or to "play an ignoble part or do a shabby thing." *Massaglia v. Comm'r*, 286 F.2d 258, 262 (10th Cir. 1961) (citation omitted). The Federal Circuit, in contrast, has held that the Government can use an administrative regulation to deny people their statutory entitlements, regardless of how deliberately dishonest the Government behaved concerning those entitlements, or whether the Government intentionally made it impossible to satisfy the regulation. *See Doe II*, 372 F.3d at 1357; *Doe IV*, 372 F.3d at 1321. This Court should grant certiorari to resolve the split.

A. The Federal Circuit's Ruling Highlights a Split Among Circuits as to Whether Affirmative Misrepresentations or Misconduct Can Give Rise to Estoppel Against the Government.

Though the Federal Circuit's approach to equitable estoppel of the Government has not been entirely consistent, its *per se* declarations in *Doe II*, 372 F.3d at 1356, that "'equitable' considerations . . . could not impose liability on the government," and in *Doe IV*, 372 F.3d at 1321, that "any equity-based attack to the reasonableness [of a regulation] . . . must fail," have been echoed in numerous other recent opinions of that court. For example, the Federal Circuit flatly has held that "actions of regulatory authorities cannot . . . create an estoppel against the government," *Computervision Corp. v. United States*, 445 F.3d 1355, 1368 (Fed. Cir. 2006), and that "misinformation supplied by the agency cannot estop the government from enforcement of the law as it is written." *Archibald v. Dep't of the Air Force*, 184 F. App'x 959, 961 (Fed. Cir. 2006). It elsewhere has declared that a "party cannot claim estoppel against the government based on the ac-

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[6] *See also Schweiker*, 450 U.S. at 788; *INS v. Hibi*, 414 U.S. 5, 8 (1973); *Montana v. Kennedy*, 366 U.S. 308, 314–15 (1961).

tions of an agency employee." *Princess Cruises, Inc. v. United States*, 201 F.3d 1352, 1360 (Fed. Cir. 2000); *see also Villaflor v. OPM*, 114 F. App'x 389, 390 (Fed. Cir. 2004) (affirming an agency ruling that it could not be "estopped from applying statutory or regulatory requirements due to agency error"). The facts of this case demonstrate that, even if an entire federal agency engages in open, deliberate misrepresentations and extreme misconduct, the Federal Circuit will not entertain an equitable estoppel against the federal government as a matter of law. *See Doe II*, 372 F.3d at 1356; *Doe IV*, 372 F.3d at 1321.[7]

A few circuits have expressed strong doubts as to whether estoppel against the Government ever is possible. *See, e.g., Savoury v. U.S. Att'y Gen.*, 449 F.3d 1307, 1318 (11th Cir. 2006) ("[I]t is far from clear that the doctrine of equitable estoppel may even be applied against a government agency."); *Volvo Trucks of N. Am., Inc. v. United States*, 367 F.3d 204, 211 (4th Cir. 2004) (noting that government estoppel may be "outright disallowed"). The majority of circuits, however, consistently has held—even after *Schweiker* and *Richmond*—that the Government ***can be*** estopped by the acts of its employees when the traditional elements of estoppel are satisfied and the agency or employee has engaged in misconduct. As the Seventh Circuit, for example, has stated, "To establish equitable estoppel, the party claiming estoppel must show:

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[7] In earlier cases, the Federal Circuit had recognized that the Government is subject to equitable estoppel in the limited context of public contract cases. *See Burnside-Ott Training Ctr., Inc. v. United States*, 985 F.2d 1574, 1581 (Fed. Cir. 1993) (holding that, because the plaintiff's equitable estoppel claim is "based upon its contract with the Navy," it "is not barred as a matter of law because of *Richmond*"). Elsewhere, the Federal Circuit has held that, "if *equitable estoppel is available at all* against the government[,] some form of affirmative misconduct must be shown." *Zacharin v. United States*, 213 F.3d 1366, 1371 (Fed. Cir. 2000) (emphasis added). The *Doe IV* court concluded that equitable estoppel of the Government was not, in fact, available.

(1) a misrepresentation by the opposing party; (2) reasonable reliance on that misrepresentation; and (3) detriment. When asserting equitable estoppel against the government, one must also prove affirmative misconduct." *Lewis v. Washington*, 300 F.3d 829, 834 (7th Cir. 2002) (citations omitted); *accord Castillo v. Ridge*, 445 F.3d 1057, 1061 (8th Cir. 2006); *Mich. Express, Inc. v. United States*, 374 F.3d 424, 427 (6th Cir. 2004); *Hoover v. West*, 93 F. App'x 177, 182 (10th Cir. 2004); *Mauting v. INS*, 16 F. App'x 788, 790–91 (9th Cir. 2001); *City of New York v. Shalala*, 34 F.3d 1161, 1168 (2d Cir. 1994); *Monongahela Valley Hosp., Inc. v. Sullivan*, 945 F.2d 576, 589 (3d Cir. 1991).

The Ninth Circuit has upheld estoppel claims against the Government based on dishonesty similar to that at issue here. For example, in *Winter v. United States*, 93 F. App'x 145 (9th Cir. 2004), the plaintiff sought compensation from the Government for alleged medical malpractice. The Government, citing 28 U.S.C. § 2401(b)'s limitations period, argued that he was statutorily barred from obtaining any such funds. The Ninth Circuit rejected this argument, holding that the Government was equitably estopped from relying on § 2401(b) as a basis for denying him payment because "the VA engaged in a pervasive pattern of affirmative misconduct" throughout the limitations period. *Id.* at 146. The court later reiterated that equitable estoppel was justified by the "pervasive pattern of affirmative misrepresentation and concealment that was deliberately perpetrated by government attorneys." *Id.* at 147. The Federal Circuit's rulings in the cases below cannot be reconciled with this holding, or the equitable estoppel caselaw of the majority of other circuits.

Numerous commentators have recognized this circuit split and the unsettled state of the law on this issue. *See, e.g.*, Joshua I. Schwartz, *The Irresistible Force Meets the Immovable Object: Estoppel Remedies for an Agency's Violation of Its Own Regulations or Other Misconduct*, 44 Admin. L. Rev. 653, 707 (1991) (noting that law concerning estoppel of the

Government is "highly incoherent" and "unintelligible to the lower courts"); *The Supreme Court—Leading Cases: Equitable Estoppel Against the Government*, 104 Harv. L. Rev. 286, 290 n.37 (1990) (discussing the "morass of conflicting approaches to governmental estoppel in the circuits"); *see also* William L. Fishman, *Property Rights, Reliance, and Retroactivity Under the Communications Act of 1934*, 50 Fed. Comm. L.J. 1, 30 (1997); Frederick S. Kuhlman, Comment, *Government Estoppel: The Search for Constitutional Limits*, 25 Loy. L.A. L. Rev. 229, 232 (1992). This Court should definitively settle the issue and hold that affirmative misconduct can give rise to equitable estoppel of the Government. The question has percolated through the lower courts for decades; in this case, it cries out for an answer.

B. The Federal Circuit's Conclusion That the Government Cannot Be Equitably Estopped, Regardless of the Severity of its Dishonesty or Misconduct, is Incorrect.

The Federal Circuit's refusal to estop the Government was unjustified, particularly given the circumstances of this case. Courts naturally are reluctant to subject the Government to estoppel based on innocent or negligent misrepresentations, particularly oral statements. *See Rapp v. U.S. Dep't of Treasury*, 52 F.3d 1510, 1516–17 (10th Cir. 1995); *Allstate Ins. Co. v. Adana Mortgage Bankers, Inc.*, 725 F.2d 1324, 1326 (11th Cir. 1984). They also are disinclined to equitably estop the Government based on the acts of one or a few of the Government's tens of thousands of low-level, front-line employees scattered throughout the nation. *See Fed. Crop Ins. Co. v. Merrill*, 332 U.S. 380 (1947); *Mont. Power Co. v. Fed'l Power Comm'n*, 185 F.2d 491, 497 (D.C. Cir. 1950) ("The Government is too vast, its operations too varied and intricate, to put it to the risk of losing that which it holds for the nation as a whole because of the oversight of subordinate officials.") (footnote omitted). Courts similarly are hesitant

to subject the Government to estoppel where doing so jeopardizes compliance with a federal statute. *See Richmond*, 496 U.S. at 424 (noting that estoppel will not support "a claim for payment of money from the Public Treasury contrary to a statutory appropriation").

None of these principles precludes estoppel against the Government here. Indeed, if affirmative misconduct by the Government or its officials ever can justify estoppel against the Government, this surely must be the case. DOJ, with the full knowledge and approval of the Attorney General and other top officials, did everything in its power to extort nearly half a billion dollars worth of extra work from its attorneys without paying a penny, notwithstanding a clear statutory command to the contrary and decades of hand-wringing over DOJ's "unlawful" and "unconscionable" conduct. *See* J.A.I 00432; J.A.II 0046–47, 0127, 0168; A. 135a. This affirmative misconduct stems not from negligence of low-level clerks, but the knowing and deliberate acts of the Department's highest ranking officials. As OLC observed, DOJ implemented a policy of refusing to pay attorneys for their overtime work as a "device" to "frustrate" a statutory command." A. 115a.

Furthermore, Petitioners seek to estop the Executive Branch from invoking a ***regulation***, 5 C.F.R. § 550.111(c), to deny them their ***statutory*** rights under 5 U.S.C. § 5542(a); thus, Petitioners' estoppel claim poses no threat to separation of powers and is not contrary to a statutory appropriation. *See Portmann v. United States*, 674 F.2d 1155, 1159 (7th Cir. 1982) ("[R]eliance on a separation of powers rationale to preclude estoppel against the government is considerably less persuasive where only an agency's own regulations are at stake than it would be where adherence to government misinformation threatens to contravene an explicit statutory requirement."). Indeed, ***refusing*** to estop the Government under the circumstances of this case threatens separation of powers by permitting the Executive Branch effectively to

nullify statutory rights established by Congress. This case—with its extensive briefing, exhaustive record, and precisely honed issues—offers this Court an ideal opportunity to end the circuit split and provide definitive guidance in a crucial area of the law that touches on individual rights and separation of powers.

III. AT A MINIMUM, GIVEN THE FEDERAL CIRCUIT'S DRAMATIC CHANGE IN THE LAW ON APPEAL, THIS COURT SHOULD SUMMARILY REVERSE THIS CASE TO ALLOW PETITIONERS THE OPPORTUNITY TO PURSUE ALTERNATE THEORIES OF RELIEF.

This Court repeatedly has recognized that if the fundamental law governing a case dramatically changes on appeal, the parties must be given an opportunity on remand to satisfy the new standard, raise new arguments, or introduce new claims that had not been necessary under the law as it previously existed. For example, in *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709 (1986), another case involving an overtime class action, the Ninth Circuit, on appeal, changed the definition of the term "seaman" under 29 U.S.C. § 213(b)(6). 475 U.S. at 714. This Court held that the Ninth Circuit erred in going on to resolve the case by applying that new definition; instead, the court of appeals should have remanded the case to the district court to allow the parties an opportunity to litigate under the new standard. *Id.*

Similarly, in *Linn v. United Plant Guard Workers of America*, 383 U.S. 53 (1966), this Court fundamentally changed the law regarding state-law libel claims that arise in labor disputes. It held, "Since the complaint here does not make the specific allegations that we find necessary in such actions, leave should be given [petitioner] on remand to amend his complaint, if he so desires, to meet these requirements." *Id.* at 66. This Court likewise concluded its decision in *Adarand*

Constructors, Inc. v. Pena, 515 U.S. 200 (1995), by stating, "Because our decision today alters the playing field in some important respects, we think it best to remand the case to the lower courts for further consideration in light of the principles we have announced." *Id.* at 237; *see also Wilson v. Seiter*, 501 U.S. 294, 305–06 (1991); *Murray v. United States*, 487 U.S. 533, 543–44 (1988); *Migra v. Warren City Sch. Bd. of Educ.*, 465 U.S. 75, 87 (1984).

In *Doe II*, the Federal Circuit reversed over fifty years of caselaw and held for the first time that, under 5 C.F.R. § 550.111(c), the Government need not pay employees for overtime work they were induced or required to perform if the Government refused to issue specific written authorization for that work. The court expressly stated, "[T]he *Anderson* line of cases is no longer good law." *Doe II*, 372 F.3d at 1357.[8] It then went on to apply the new standard to the facts of this case. Based on its appellate fact-finding, the court granted summary judgment to the Government, in clear violation of *Icicle Seafoods*.

Despite this seismic shift in federal overtime law, the *Doe IV* court affirmed the lower court's refusal to permit Petitioners to raise new theories of relief or to amend their Complaint to bring new claims. It stated that *Doe II* "does not set forth a new legal standard that might allow the Doe plaintiffs to make new arguments before the trial court under

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[8] The "*Anderson* line of cases" included *Buckley v. United States*, 51 Fed. Cl. 174, 217 (2001); *Hannon v. United States*, 29 Fed. Cl. 142, 149 (1993); *DeCosta v. United States*, 22 Cl. Ct. 165, 176–77 (1990); *Manning v. United States*, 10 Cl. Ct. 651, 653 (1986); *Taylor v. United States*, 223 Ct. Cl. 655, 655 (1980); *Fox v. United States*, 416 F. Supp. 593, 597–98 (E.D. Va. 1976); *McQuown v. United States*, 199 Ct. Cl. 858, 867 (1972); *Baylor v. United States*, 198 Ct. Cl. 331, 360 (1972); *Bates v. United States*, 450 F.2d 886, 890–91 (Ct. Cl. 1971); *Rapp v. United States*, 340 F.2d 635, 641 (Ct. Cl. 1964); *Byrnes*, 163 Ct. Cl. at 173–74 (1963); and *Aviles v. United States*, 151 Ct. Cl. 1, 7–8 (1960).

that standard." *Doe IV*, 463 F.3d at 1322. The court explained that Petitioners should have predicted that the dozens of cases upon which they had relied were bad law because "the Doe plaintiffs knew about *Hansen* and *Richmond* before [*Doe II*] was decided and had their opportunity to mount arguments under the principles of those cases." *Id.*

The Federal Circuit's ruling was incorrect. The simple fact that *Schweiker* (in 1981) and *Richmond* (in June 1990), had been published before this case does not mean that this Court had *sub silentio* overruled dozens of Court of Claims and Court of Federal Claims cases. Indeed, several of the cases upon which Petitioners relied were published ***after*** *Schweiker* and *Richmond* and continued to apply *Anderson*. *See, e.g.*, *Buckley*, 51 Fed. Cl. at 217 ("[O]vertime work may be considered 'officially ordered or approved' if the employee was induced to perform overtime," even without an "explicit directive or order"); *Hannon*, 29 Fed. Cl. at 149 (1993); *DeCosta*, 22 Ct. Cl. at 176–77 (Dec. 1990). Even in this case, the Court of Federal Claims concluded that Petitioners' theory of recovery was valid and awarded Petitioners summary judgment. *Doe I*, 54 Fed. Cl. at 418. Furthermore, neither *Schweiker* nor *Richmond* compelled the Federal Circuit to rule that an agency could require an employee to work overtime without being paid.

Thus, there is no basis for the Federal Circuit's unsupported declaration that Petitioners are not entitled to raise new claims because *Doe II* did not fundamentally change the law. Given the Federal Circuit's cataclysmic change in the governing law, this Court—at the very least—should summarily reverse and remand this case to permit Petitioners to raise new claims and pursue alternate avenues of relief that were not necessary under the legal landscape as it formerly existed.

IV. THIS CASE WARRANTS CERTIORARI.

This case presents three of this Court's articulated grounds for granting certiorari: (1) an important question of federal employment law of broad significance to the nation's 2.7 million federal civilian employees; (2) a court of appeals that disregarded this Court's precedents in countenancing the Executive Branch's nullification of valid acts of Congress; and (3) a circuit split as to whether the federal government may ever be estopped for its deceptive and illegal conduct. Although appropriations riders enacted in 1999 and 2000 purport to prohibit federal funds from being used to pay Department of Justice attorneys for any ***future*** overtime work,[9] these provisions do not affect either Petitioners' claims here or the ***continuing*** overtime rights of millions of federal employees in the Government's dozens of other agencies, to whom these riders do not apply.

Now that the Federal Circuit has entered final judgment, this case is ripe for adjudication by this Court. After *Doe II*, Petitioners sought certiorari of the Federal Circuit's interlocutory opinion concerning a single count of the three-count Complaint.[10] The Government encouraged this Court to deny

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[9] *See* Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. No. 106-113, § 1000(a)(1), 113 Stat. 1501, 1501A21 (1999); Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, Pub. L. No. 106-553, § 1(a)(2), 114 Stat. 2762, 2762A68 (2000). It is by no means settled whether these riders actually have prospective effect beyond the fiscal years covered by each of the Appropriations Acts. *See Robertson v. Seattle Audobon Soc'y*, 503 U.S. 429, 440 (1992) (noting presumption that appropriations riders are not to be given prospective effect); *see, e.g.*, *Auburn Hous. Auth. v. Martinez*, 277 F.3d 138, 146–47 (2d Cir. 2002) (holding that appropriations rider imposing restriction on federal funds that applied "hereafter" did not have prospective effect beyond the fiscal year in which it was enacted).

[10] The previous Petition for Certiorari sought review of whether *Schweiker* and *Richmond* barred Petitioners' overtime claims. It also

certiorari because of "the interlocutory nature of [the] petition," Br. for the U.S. in Opp'n at 12, and this Court denied review, 544 U.S. 904 (2005). The procedural difficulties that existed at the time of this prior Petition for Certiorari have now been resolved and a final judgment has been entered denying relief on all grounds under any theory. *Cf. Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 679 n.19 (1979) (discussing grant of certiorari despite an "earlier denial of certiorari . . . at an interlocutory stage in the proceedings"). This case now presents the last, best chance for this Court to address whether the Executive Branch can rely on its own misconduct to frustrate clear statutory rights.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court issue a writ of certiorari.

Respectfully submitted,

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asked this Court to consider whether § 550.111(c) was facially valid and entitled to *Chevron* deference.